(2)

No. 06-1036

FILED
MAR 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

RALPH TAYLOR,

Petitioner,

v.

CITY OF FALMOUTH, KENTUCKY,
and DONALD ENGLAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARY ANN STEWART
Counsel of Record
JENNIFER L. LANGEN
ADAMS, STEPNER, WOLTERMANN
& DUSING PLLC
40 West Pike Street
Covington, Kentucky 41011
(859) 394-6200

Attorney for Respondents, City of Falmouth, Kentucky, and Donald England

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Whether the Sixth Circuit correctly interpreted and applied the "person of ordinary firmness" standard in upholding a district court's decision granting summary judgment to the City of Falmouth and Councilmember Donald England on Petitioner's First Amendment retaliation claim?

(2) In holding that speech cannot form the basis for an Equal Protection Clause claim in the absence of "harassment or other conduct," did the Sixth Circuit correctly apply the law as set forth in Village of *Arlington Heights v. Met. Hous. Dev. Corp.*, 429 U.S. 252 (1977)?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

PROCEEDINGS BELOW 5

REASONS FOR DENYING THE PETITION 7

I. THE PETITION CONTAINS MISLEADING STATEMENTS ABOUT THE FACTS OF THE INCIDENT ON WHICH PETITIONER'S CLAIMS WERE PREMISED 7

II. THERE IS NO JUSTIFICATION FOR THE EXERCISE OF CERTIORARI ON PETITIONER'S FIRST AMENDMENT CLAIM 12

A. THE HISTORY AND STANDARD ANNOUNCED BY THIS COURT IN *BURLINGTON NORTHERN* 12

B. THERE IS NO "SPLIT" AMONG THE CIRCUITS WITH RESPECT TO WHETHER VERBAL CONDUCT ALONE CAN SATISFY THE "ADVERSE ACTION" ELEMENT OF FIRST AMENDMENT RETALIATION CLAIMS 15

III. THE "HARASSMENT OR OTHER CONDUCT" REQUIREMENT IN EQUAL PROTECTION CASES PREMISED ON A RACIAL SLUR IS CONSISTENT WITH *ARLINGTON HEIGHTS* 21

TABLE OF CONTENTS – Continued

Page

IV. PETITIONER HAS PRESENTED NO JUSTIFICATION FOR THE GRANT OF CERTIORARI AS AGAINST THE CITY OF FALMOUTH 24

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Abuhouran v. Acker, 2005 U.S. Dist. LEXIS 12864 (E.D. Pa. June 29, 2005) 24

Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987) 20

Anderson v. Kierstead, 2006 U.S. Dist. LEXIS 4728 (D.N.J. Feb. 6, 2006) 23

Balt. Sun Co. v. Ehrlich, 437 F.3d 410 (4th Cir. 2006) 17

Bart v. Telford, 677 F.2d 622 (7th Cir. 1982) 17

Bender v. Brumley, 1 F.3d 271 (5th Cir. 1993) 20

Bennett v. Hendrix, 423 F.3d 1247 (11th Cir. 2005) 16, 17

Blankenship v. Manchin, 471 F.3d 523 (4th Cir. 2006) 16, 17

Brown v. Runnels, 2006 U.S. Dist. LEXIS 28658 (E.D. Cal. May 11, 2006) 17

Buckley v. Gomez, 1999 U.S. App. LEXIS 129 (9th Cir. Jan. 4, 1999) 23

Burkybile v. Bd. of Educ., 411 F.3d 306 (2nd Cir. 2005) 16

Burlington Northern & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405 (2006) .....*passim*

Cannon v. Burkybile, 2000 U.S. Dist. LEXIS 14139 (N.D. Ill. Sept. 25, 2000) 24

Carrasca v. Pomeroy, 313 F.3d 828 (3rd Cir. 2002) 22

Chicago Reader v. Sheahan, 141 F. Supp. 2d 1142 (N.D. Ill. 2001) 18

TABLE OF AUTHORITIES – Continued

Page

City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003).....22, 23

Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474 (4th Cir. 2005) 16

Coyle v. Hughs, 436 F. Supp. 591 (W.D. Ok. 1977)..... 20

Crocker v. City of Kingsville, 2006 U.S. Dist. LEXIS 51410 (S.D. Tex. July 26, 2006) 16

Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro, 2007 U.S. App. LEXIS 3689 (6th Cir. Feb. 20, 2007).....16, 17

Dawes v. Walker, 239 F.3d 489 (2nd Cir. 2001).....16, 18

DeWalt v. Carter, 224 F.3d 607 (7th Cir. 1999) 23

Elston v. Talladega Co. Bd. Of Educ., 997 F.2d 1394 (11th Cir. 1993)..... 22

Framsted v. Mun. Ambulance Serv., 347 F. Supp. 2d 638 (W.D. Wisc. 2004)..... 16

Garcia v. City of Trenton, 348 F.3d 726 (8th Cir. 2003)..... 17

Giannini v. Calif. State Bar Assn., 2006 U.S. App. LEXIS 27975 (9th Cir. Nov. 8, 2006)..... 16

Gilbrook v. City of Westminster, 177 F.3d 839 (9th Cir. 1999) 20

How v. City of Baxter Springs, 2007 U.S. App. LEXIS 4083 (10th Cir. Feb. 22, 2007).....16, 17

Izen v. Catalina, 398 F.3d 363 (5th Cir. 2005)..... 16

Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004)..... 24

Keyes v. Albany, 594 F. Supp. 1147 (N.D.N.Y. 1984) 22

TABLE OF AUTHORITIES – Continued

Page

Martin v. City of San Antonio, 2006 U.S. Dist. LEXIS 54392 (W.D. Tex. July 25, 2006) 24

Massey v. Johnson, 457 F.3d 711 (7th Cir. 2006) 16

McBride v. Village of Michiana, 100 F.3d 457 (6th Cir. 1996) 20

McKee v. Hart, 436 F.3d 165 (3rd Cir. 2006) 17, 18

McKee v. Rockwall, 877 F.2d 409 (5th Cir. 1989) 22

Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283 (9th Cir. 1999) 16

Mezibov v. Allen, 411 F.3d 712 (6th Cir. 2005) 16, 18

Mimics, Inc. v. Vill. of Angel Fire, 394 F.3d 836 (10th Cir. 2005) 16

Mitchell v. Chandler, 2006 U.S. Dist. LEXIS 71843 (W.D. Ky. Sept. 26, 2006) 17

Morris v. Powell, 449 F.3d 682 (5th Cir. 2006) 17

Naucke v. City of Park Hills, 284 F.3d 923 (8th Cir. 2002) 18

Nunez v. City of Los Angeles, 147 F.3d 867 (9th Cir. 1998) 18, 20

O'Connor v. City of Newark, 440 F.3d 125 (3rd Cir. 2006) 16

Osborne v. Grussing, 2007 U.S. App. LEXIS 4134 (8th Cir. Feb. 26, 2007) 16

Phillips v. Bowen, 278 F.3d 103 (2d Cir. 2002) 20

Pittman v. Tucker, 2007 U.S. App. LEXIS 381 (11th Cir. Jan. 9, 2007) 16, 20

Revels v. Vincenz, 382 F.3d 870 (8th Cir. 2004) 16

TABLE OF AUTHORITIES – Continued

Page

Richardson v. Sherrer, 2007 U.S. Dist. LEXIS 4994 (D.N.J. Jan. 23, 2007) 18

Salley v. PA Dept. of Corr., 181 Fed. Appx. 258 (3rd Cir. 2006) 23

Suarez Corp. Ind. v. McGraw, 202 F.3d 676 (4th Cir. 2002) 18, 20

Sylvia Dev. Corp. v. Calvery Corp., 48 F.3d 810 (4th Cir. 1995) 22

Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) 17

Thomas v. Independence Twnp., 463 F.3d 285 (3rd Cir. 2006) 16, 20

Trudeau v. FTC, 372 U.S. App. D.C. 335 (2006) 16

Village of Arlington Hts. v. Met. Hous. Dev. Corp., 429 U.S. 252 (1977) 21, 22, 23

Williams v. Bramer, 180 F.3d 699 (5th Cir. 1999) 22

XMen Sec. Inc. v. Pataki, 196 F.3d 56 (2nd Cir. 1999) 18

Zelnik v. Fashion Inst. of Tech., 464 F.3d 217 (2nd Cir. 2006) 16, 17

STATUTORY PROVISIONS

42 U.S.C. § 1983 5

42 U.S.C. § 2000e-2 12

42 U.S.C. § 2000e-3 12

COUNTERSTATEMENT OF THE CASE

On August 22, 1998, pursuant to the City of Falmouth's nuisance ordinance, two City police officers towed what they believed was an abandoned vehicle from Petitioner's property. The vehicle in question was owned by Petitioner's adult son, Shawn Taylor.

Over the next five years, Petitioner appeared sporadically at City Council meetings to complain about the towing of his son's vehicle.[1] Specifically, Petitioner appeared at Council meetings on December 29, 1998 and June 8, 1999, demanding on both occasions that the vehicle be returned to him. (R. 19 Defendants' MSJ at Ex. 3 and 4, Apx. pp. 113-119) Each time, City Council referred Petitioner to then-Police Chief Greg Reis for resolution of the matter. (R. 19 Defendants' MSJ at Ex. 3 and 4, Apx. pp. 113-119) Chief Reis, who happened to be present at the June 8, 1999, meeting, offered to meet with Petitioner the next morning to look into the matter. However, Petitioner did not follow up with Chief Reis on either occasion because he had spoken to Chief Reis once in August 1998 and apparently doubted Reis' ability to locate the vehicle. (R. 44 R. Taylor at TR 76-77, 79, Apx. pp. 212-213, 215)

For 18 months, Petitioner made no further inquiries about the vehicle. Then, on January 2, 2002, he again appeared before City Council and requested the return of the vehicle. (R. 19 Defendants' MSJ at Ex. 5, Apx. pp.

---

[1] Shawn Taylor himself never responded to the towing and never made any inquiries on his own behalf about the vehicle until the instant action was filed with the district court. Shawn Taylor's Fourteenth Amendment procedural due process claim against the City and the police officers who ordered the towing – the only claim asserted by either of the plaintiffs that survived summary judgment – settled.

120-125) By this time, Petitioner already knew that the vehicle had been crushed, information that he did not share with the City when making his demand for the return of the vehicle.[2] (R. 44 R. Taylor at TR 81) In addition, most of the persons who comprised City Council on January 2, 2002 were not Councilmembers on June 8, 1999, the last time Petitioner addressed Council about the towing. (R. 46 T. England at TR 24, Apx. p. 261) Thus, Council was not prepared to address Petitioner's inquiries, but requested that then-Mayor Flaugher investigate and report on the matter at the next regularly scheduled Council meeting on February 5, 2002. (R. 19 Defendants' MSJ at Ex. 5, Apx. pp. 120-125)

Although Petitioner did not appear at the February 5, 2002 Council meeting, City Clerk Terry England reported that the vehicle had been towed in 1998 under the City's nuisance ordinance; that it had been taken to Top Shop Garage; that the garage was no longer in business; and that the vehicle could not be located. (R. 19 Defendants' MSJ at Ex. 6, Apx. pp. 126-130)

Six months later, on August 6, 2002, Petitioner again appeared at a Council meeting, demanding the return of "his"[3] vehicle. (R. 19 Defendants' MSJ at Ex. 7, Apx. pp. 131-134) From the start, Petitioner was extremely confrontational with City Clerk Terry England, whom he accused of hiding the vehicle. (R. 19 Defendants' MSJ at Ex. 7, Apx. pp. 131-134; R. 46 C. Clifford at TR 16, Apx. p.

---

[2] Petitioner testified that he talked with the owner of Top Shop Garage in 1999 and was told at that time that the vehicle had been crushed. (R. 44 R. Taylor at TR 72, Apx. p. 210)

[3] Again, the vehicle belonged to his adult son, another fact Petitioner withheld from Falmouth City Council.

257; R. 46 T. England at TR 25, Apx. p. 261) The discussion between Petitioner and Terry England became heated and was loud enough that it interfered with the progression of Council's agenda. (R. 46 M. Shields at TR 25-26, Apx. pp. 254-255; R. 46 T. England at TR 27-28, Apx. p. 262; R. 46 D. Cross at TR 15-16, Apx. p. 258)

Councilmember Donald England (Terry England's father) told Petitioner and Terry England to be quiet so City Council could focus on its business. (R. 19 Defendants' MSJ at Ex. 7, Apx. pp. 131-134; R. 46 M. Shields at TR 26, Apx. p. 255; R. 46 T. England at TR 28, Apx. p. 262; R. 46 D. England at TR 38-39, Apx. p. 243) In response, Petitioner approached Councilmember England and said, "I'm not afraid of you." (R. 19 Defendants' MSJ at Ex. 7, Apx. pp. 131-134; R. 46 D. England at TR 38-39, Apx. p. 243; R. 46 T. England at TR 28, Apx. p. 262) Councilmember England then called Petitioner a "black bastard" and invited him to "step outside." (R. 19 Defendants' MSJ at Ex. 7, Apx. pp. 131-134; R. 44 R. Taylor at TR 92, Apx. p. 224; R. 46 C. Clifford at TR 16, Apx. p. 257; R. 46 M. Shields at TR 27, Apx. p. 255; R. 46 T. England at TR 28, Apx. p. 262; R. 46 D. England at TR 36, Apx. p. 242) The rest of Council audibly gasped in disbelief when England made the remark.[4] (R. 44 R. Taylor at TR 95, Apx. p. 227)

After making the remark, Donald England went outside. A police officer who regularly attended City Council meetings and a councilmember followed and detained *England*, a measure Petitioner acknowledges was intended

[4] In his deposition, Petitioner characterized the reaction to England's comment as nervous laughter, "like, you know, like one little kid does something, all the kids does, oh, that's all I heard." (R. 44 R. Taylor at TR 95, Apx. p. 227)

to make sure there would be no physical confrontation outside. (R. 44 R. Taylor at TR 93-94, 98, Apx. pp. 225-226, 230) Petitioner stayed to finish addressing the remaining members of Council. He told Council he would come back the following month to discuss his vehicle again. (R. 44 R. Taylor at TR 93-94, Apx. pp. 225-226)

Having finished addressing City Council, Petitioner left the meeting. Donald England, who was then outside, was being detained by a police officer and one of his fellow Councilmembers to calm him down and to ensure that no physical confrontation ensued between England and Petitioner. (R. 44 R. Taylor at TR 93-94, 98, Apx. pp. 225-226, 230) Petitioner attempted to walk in England's direction, purportedly because that was the way to his home. However, to prevent any interaction between England and Petitioner, a police officer told Petitioner he could not walk in that direction. Rather than taking another route home, Petitioner remained at the scene for approximately 30-45 minutes, during which time he now claims he was being "detained."

Notwithstanding England's remark, the City Attorney who was present at the August 6, 2002 Council meeting encouraged Petitioner to submit a claim for compensation for the vehicle that had been towed. (R. 44 R. Taylor at TR 78-79, Apx. pp. 214-215) City Council also directed its City Clerk and City Attorney to investigate Petitioner's allegation about the towing of the vehicle. (R. 19 Defendants' MSJ at Ex. 8, Apx. pp. 135-139) Indeed, City Council placed Petitioner on the agenda for its September 3, 2002, meeting, and the City Attorney reported the results of his investigation at that time. (R. 19 Defendants' MSJ at Ex. 1, Apx. pp. 107-111).

Having investigated the matter, the City Attorney reported that Shawn Taylor, not Petitioner, owned the vehicle and that the claim had to be resolved with the vehicle's owner. (R. 19 Defendants' MSJ, Apx. pp. 76-106). Not having heard from Shawn Taylor, the actual owner of the vehicle, City Council took no further action.

PROCEEDINGS BELOW

On July 1, 2003, Petitioner filed a Complaint against the City of Falmouth, Mayor Gene Flaugher, the two police officers who had directed the towing of the vehicle,[5] and Councilmembers, Donald England, Janet Field, Mary Ann Shields, Clay Clifford, Don Cross and Virgil Moore, all in their individual and official capacities (collectively "Falmouth Defendants"), alleging, pursuant to 42 U.S.C. § 1983, that Falmouth Defendants had violated his and Shawn Taylor's constitutional rights.

Shawn Taylor asserted multiple causes of action under the Fourth and Fourteenth Amendments in connection with the towing of his vehicle. (R. 1 Complaint, Apx. pp. 20-30) The District Court granted summary judgment in Shawn Taylor's favor on his Fourteenth Amendment procedural due process claim, but granted summary judgment to Falmouth Defendants on all of

[5] Petitioner's reference to having sued "several police officials" in paragraph 6 of his "Statement of the Case," followed in quick succession by his reference to a "police detention" in the next paragraph improperly suggests that he asserted a Fourth Amendment claim against the officers who allegedly detained him. He did not. The only police officers named as defendants in Petitioner's Complaint were the two who towed Shawn Taylor's vehicle. Petitioner asserted no claim against them.

Shawn Taylor's other claims. (R. 52 Opinion at 1-23, Apx. pp. 31-53) The parties settled Shawn Taylor's procedural due process claim and Shawn Taylor never appealed the remainder of the District Court's decision.

Petitioner asserted claims premised on both the towing and the incident in which Donald England called him a "black bastard." (R. 1 Complaint, Apx. pp. 20-30) When Falmouth Defendants challenged his standing to raise claims based on the towing and asserted a statute of limitations defense to those claims, Petitioner abandoned all claims premised on the towing and sought to recover solely for England's "black bastard" remark. (R. 19 Defendants' Memorandum in Support of MSJ at 6-8, Apx. pp. 81-83; R. 27 Plaintiffs' Response to Defendants' MSJ at 6, Apx. p. 147) Thus, Petitioner alleged that England violated his right to equal protection and retaliated against him for exercising his First Amendment rights by calling him a "black bastard." In addition, Petitioner alleged that Flaugher, Field, Shields, Clifford, Cross and Moore ("Council Defendants") were liable in their individual capacities for failing to rebuke England after that comment. Finally, Petitioner sought to impose liability on the City of Falmouth in connection with England's remark and the elected officials' alleged lack of response to that remark.

In a thorough and well-reasoned opinion, the District Court granted summary judgment to the City, Councilmember England and the Council Defendants on all of Petitioner's claims. Petitioner appealed that decision to the Sixth Circuit Court of Appeals, and the Sixth Circuit, in an equally sound and well-reasoned opinion, affirmed the District Court's decision.

By way of the instant Petition, Petitioner seeks review of the Sixth Circuit's decision with respect to his First Amendment retaliation and equal protection claims against Councilmember England. In addition, having identified the City of Falmouth as a party to this proceeding, Petitioner apparently seeks review in this forum of the Sixth Circuit's decision with respect to his municipal liability claim.

REASONS FOR DENYING THE PETITION

I. THE PETITION CONTAINS MISLEADING STATEMENTS ABOUT THE FACTS OF THE INCIDENT ON WHICH PETITIONER'S CLAIMS WERE PREMISED

Before getting to the heart of this Response, it is necessary to clarify several misleading statements and/or inaccurate implications contained in the Petition.

First, Petitioner contends that "the City's legislative body itself engage[d] in the racially intimidating conduct" and repeatedly imputes England's comments to the City Council as a whole. (Petition, pp. 7, 19, 25-30, FN 6 and 7) That is wholly unsupported by any evidence in the record. The only person who uttered a racially insensitive or intimidating comment is Donald England. It is elementary that a legislative body speaks *not* through the voice of a single legislator, but *only* by majority vote. Any other arrangement would require a vote on every sentiment ever expressed by a councilmember, lest one councilmember's diatribe be subsequently construed as the opinion of "the legislative body itself." As such, the legislative body itself did not engage in racially intimidating conduct.

Second, Petitioner states: "Mr. England then walked outside, accompanied by an armed officer, for the purpose of making good on his threat." (Petition, pp. 6-7) As written, this statement could be read to unfairly infer that the "armed guard"[6] was brought along to reinforce England's threat. However, as Petitioner plainly acknowledges, a police officer and another councilmember each on their own initiative, followed England outside in order to ensure that England *did not* fight with Petitioner. (R. 44 R. Taylor at TR 93-98, Apx. pp. 225-230)

Third, Petitioner asserts that Falmouth City Council "rejected" his complaints about the towing of his son's vehicle and that the rejection was "racist." (Petition, p. 7) This assertion is completely unfounded. For one thing, Council did not "reject" Petitioner's complaints. To the contrary, the City Attorney suggested that Petitioner submit a claim to the City's insurance carrier, a suggestion Petitioner concedes he simply ignored. (R. 44 R. Taylor at TR 78-79, Apx. pp. 214-215) In addition, Council directed then-Mayor Flaugher and the City Clerk to investigate the circumstances of the towing and the whereabouts of the vehicle and to report back at the next regularly scheduled meeting of Falmouth City Council. The City Attorney, in addressing his client, the City, rendered legal opinions concerning Petitioner's standing to contest the towing and the expiration of the statute of limitations. There was no evidence that these legal conclusions, which were unchallenged, were racist or that Council's reliance thereon was motivated by racial prejudice.

---

[6] The Sergeant-At-Arms of Ci , Council, who was also a police officer for the City of Falmouth, is the "armed guard" to whom Taylor refers. (R. 44 R. Taylor at TR 95, Apx. p. 227)

Petitioner has never produced any evidence that Falmouth City Council *as a whole* treated him any differently than it treated others, or that any difference in treatment was the result of Petitioner's race. To the contrary, just as it had done for other citizens in the past, Falmouth City Council gave Petitioner permission to address Council on a matter that was not on the agenda. (R. 46 V. Moore at TR 13-14, Apx. pp. 263-264; R. 46 Gene Flaugher at TR 60, Apx. p. 251; R. 46 T. England at TR 19-21, Apx. p. 260) In addition, Falmouth City Council responded to Petitioner's complaint the same way it responded to complaints from other citizens, i.e., by directing the Mayor to investigate and report back to Council. (R. 46 D. Cross at TR 23-24, Apx. p. 259; R. 46 D. England at TR 26-27, Apx. p. 241)

Finally, since the fact that England threatened him did not convince the District Court that he had a viable equal protection claim, Petitioner shifted the focus of his argument on appeal and in this Petition. Specifically, Petitioner now insinuates that he was "detained" by officers outside of the City building following his verbal exchange with England and that the detention constitutes "harassment," such that he has a viable Equal Protection claim.[7] There are two problems with this insinuation. First, while case law suggests that "harassment or other conduct" might be sufficient to state a viable equal protection claim, it certainly does not stand for the proposition that *any* inconvenience or perceived harassment – no

[7] Petitioner's Complaint did not assert a Fourth Amendment violation based on this detention, nor did he argue in any of his briefs at the trial court level that the detention constituted "harassment" sufficient to support his equal protection claim.

matter how *de minimis* – supports an equal protection claim. Second, there is no support for Petitioner's contention that he was "unlawfully" detained. Everyone agrees that Petitioner initiated a discussion that led to "a hot and heated night" in Falmouth City Council chambers[8], that England asked Petitioner to "step outside," and that Petitioner construed that as a threat to his personal safety. (R. 44 R. Taylor at TR 78, Apx. p. 214) Everyone also agrees that police officers and a councilmember followed the two outside, separated them to prevent any physical confrontation and to protect Petitioner, and told them "there wasn't going to be no fighting on this sidewalk." (R. 44 R. Taylor at TR 93-96, 98, Apx. pp. 225-228, 230) According to Petitioner, both he *and England* were detained, though separately. (R. 44 R. Taylor at TR 94, Apx. p. 226) While Petitioner apparently disagrees with the way the situation was handled, he has offered no legal authority to suggest that it was unreasonable as a matter of law to handle the situation as the police officers did. As such, Petitioner's assertion that he was "unlawfully" detained is without merit. More importantly, however, that assertion simply does not support his Equal Protection claim.[9]

As the courts below both correctly noted, the conduct that Petitioner relies upon to establish his claims consists

---

[8] While Petitioner denies it was his fault things got heated, by his own testimony he acknowledges that it "was a hot and heated night" at Falmouth City Council chambers. (R. 44 R. Taylor at TR 78, 89, Apx. pp. 214, 221)

[9] Plaintiff never asserted a claim for unlawful detention under the Fourth or Fourteenth Amendment in his Complaint. Plaintiff never named the alleged armed guards as Defendants; nor did he assert an unlawful detention claim against the councilmember who went outside.

solely of speech. Specifically, Petitioner relies upon a single verbal exchange between himself and Donald England. No physical confrontation between Donald England and Petitioner ever occurred; Councilmember Shields and a police officer who was present when Defendant England made his remark, each on their own initiative, went outside to make sure that no such confrontation ensued. Beyond this one verbal exchange that was initiated by Petitioner, he cannot point to anything else in support of his claims. The fact remains that Petitioner relies solely on speech to establish both a First Amendment retaliation claim and an equal protection violation. Under the legal authority he himself cites, such evidence was insufficient to overcome summary judgment. Having been unsuccessful in two attempts to convince the courts that he could sustain a claim, Petitioner now contends that the Sixth Circuit misconstrued the law and failed to apply applicable precedent. For the reasons explained herein, that contention cannot succeed.

In sum, the courts below were correct to grant summary judgment to the City and Council Defendants on Petitioner's claims. Though cleverly couched in terms of "conflicts" among the circuits and the failure to apply new precedent from this Court, all that the Petition really seeks is a review of the manner in which the Sixth Circuit applied existing applicable precedent. There is no conflict among the circuits, and the Sixth Circuit's application of the law to these facts is wholly consistent with the law as applied by its sister circuits.

II. THERE IS NO JUSTIFICATION FOR THE EXERCISE OF CERTIORARI ON PETITIONER'S FIRST AMENDMENT CLAIM

Petitioner's chief contention in support of certiorari is that *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006), has been insufficient to eliminate the so-called "division" among the circuit courts in applying the second element of First Amendment retaliation claims. (Petition, pp. 14-17) Petitioner's contention lacks merit and does not support a grant of certiorari.

A. THE HISTORY AND STANDARD ANNOUNCED BY THIS COURT IN *BURLINGTON NORTHERN*

This Court's decision in *Burlington Northern* resolved a split among the circuits as to whether Title VII's anti-retaliation provision should be interpreted coterminous with Title VII's anti-discrimination provision, such that the type of adverse employment action necessary to support a retaliation case was limited to the type of adverse employment action necessary to support a discrimination case.[10] Specifically, prior to *Burlington Northern*, some circuits applied an "ultimate employment decision" standard in which retaliation was not actionable unless it affected one of a narrow list of categories "such as hiring, granting leave, discharging, promoting, and

[10] Title VII's anti-discrimination provision appears at 42 U.S.C. § 2000e-2 and forbids discrimination against any members of certain protected groups "with respect to the terms and conditions of [their] employment." Title VII's anti-retaliation provision appears at 42 U.S.C. § 2000e-3 and forbids retaliation against an employee who has "opposed" a practice that is unlawful under Title VII's anti-discrimination provision.

compensating." Other circuits held that retaliation was actionable if it affected a "term or condition" of employment, "term or condition" being defined the same in both anti-discrimination and anti-retaliation cases. A few circuits held that the scope of actionable retaliatory conduct was broader than the scope of actionable discriminatory conduct. *See id.* at 2410-2411. Of course, the restrictive standards applied by some circuits left open many avenues for an employer to retaliate against an employee for having participated in Title VII enforcement proceedings without fear of liability.

In deciding *Burlington Northern*, this Court defined the scope of actionable retaliatory conduct in a Title VII context. The Court made clear that retaliatory conduct does not necessarily have to affect an ultimate employment decision or a term or condition of employment to be actionable, and that retaliatory conduct could, under the right circumstances, be actionable even if it occurred outside of the workplace. *See id.* at 2412-2414. In light of this Court's decision in *Burlington Northern*, an employee can recover under 42 U.S.C. § 2000e-3 for retaliation against her by her employer if the conduct would deter a reasonable employee from making or supporting a charge of discrimination. *Id.* at 2415. This is a broader standard than previously applied by many circuits in Title VII anti-retaliation cases.

Despite its breadth, the standard announced in *Burlington Northern* does not render *all* retaliatory conduct actionable in Title VII cases, a point that Petitioner neglects to acknowledge. This Court was quite clear on that point:

The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. . . . In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." . . .

We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth a general civility code for the American workplace. . . . An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights that all employees experience. . . . The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. . . . It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC, the courts and their employers. And normally petty slights, minor annoyances and simple lack of good manners will not create such deterrence. . . .

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters . . . Hence a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others."

By focusing on the materiality of the challenged action and the perspective of a reasonable person

> in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

Id. at 2414-2416 (citations omitted). Thus, actionable retaliatory conduct in Title VII cases is now limited by one consideration and one consideration only: whether, under the circumstances, the retaliation was sufficient to deter a reasonable employee from asserting or supporting a charge of Title VII discrimination. This, of course, is precisely the standard the Sixth Circuit applied in the present case.

B. THERE IS NO "SPLIT" AMONG THE CIRCUITS WITH RESPECT TO WHETHER VERBAL CONDUCT ALONE CAN SATISFY THE "ADVERSE ACTION" ELEMENT OF FIRST AMENDMENT RETALIATION CLAIMS

The broad standard adopted by this Court in Title VII cases is essentially the same broad standard federal courts have applied, *even prior to Burlington Northern*, in First Amendment retaliation cases.

Specifically, federal courts universally hold that *any* conduct sufficient to deter a person of ordinary firmness from continuing to speak out on a matter of public concern satisfies the "adverse action" element of a First Amendment retaliation claim. Petitioner's intimation that the Second Circuit is the only circuit to apply this standard is simply inaccurate.[11] *Every* federal circuit to have confronted a

[11] See Petition, pp. 12-13.

First Amendment retaliation case has applied this flexible standard, both *before* and *since* this Court's June 22, 2006 decision in *Burlington Northern*. *See e.g., Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217 (2nd Cir. 2006); *Burkybile v. Bd. of Educ.*, 411 F.3d 306 (2nd Cir. 2005); *Thomas v. Independence Twnp.*, 463 F.3d 285 (3rd Cir. 2006); *O'Connor v. City of Newark*, 440 F.3d 125 (3rd Cir. 2006); *Blankenship v. Manchin*, 471 F.3d 523 (4th Cir. 2006); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); *Crocker v. City of Kingsville*, 2006 U.S. Dist. LEXIS 51410 (S.D. Tex. July 26, 2006); *Izen v. Catalina*, 398 F.3d 363 (5th Cir. 2005); *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 2007 U.S. App. LEXIS 3689 (6th Cir. Feb. 20, 2007); *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005); *Massey v. Johnson*, 457 F.3d 711 (7th Cir. 2006); *Framsted v. Mun. Ambulance Serv.*, 347 F. Supp. 2d 638 (W.D. Wisc. 2004); *Osborne v. Grussing*, 2007 U.S. App. LEXIS 4134 (8th Cir. Feb. 26, 2007); *Revels v. Vincenz*, 382 F.3d 870 (8th Cir. 2004); *Giannini v. Calif. State Bar Assn.*, 2006 U.S. App. LEXIS 27975 (9th Cir. Nov. 8, 2006); *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283 (9th Cir. 1999); *How v. City of Baxter Springs*, 2007 U.S. App. LEXIS 4083 (10th Cir. Feb. 22, 2007); *Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836 (10th Cir. 2005); *Pittman v. Tucker*, 2007 U.S. App. LEXIS 381 (11th Cir. Jan. 9, 2007); *Bennett v. Hendrix*, 423 F.3d 1247 (11th Cir. 2005); *Trudeau v. FTC*, 372 U.S. App. D.C. 335 (2006).

Of course, and consistent with *Burlington Northern*, some conduct undertaken to retaliate against a person for his First Amendment expression will not be actionable under this standard. Just as Title VII retaliation cannot be premised on "trivial harms," *Burlington Northern*, *supra*,

First Amendment retaliation "is not born of de minimis threats or inconsequential actions." *Ctr. For Bio-Ethical Reform*, *supra*, citing *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999); *see also Dawes v. Walker*, 239 F.3d 489 (2nd Cir. 2001); *McKee v. Hart*, 436 F.3d 165 (3rd Cir. 2006); *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006); *Morris v. Powell*, 449 F.3d 682 (5th Cir. 2006); *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982); *Garcia v. City of Trenton*, 348 F.3d 726 (8th Cir. 2003); *Brown v. Runnels*, 2006 U.S. Dist. LEXIS 28658 (E.D. Cal. May 11, 2006); *How*, *supra*; *Bennett*, *supra*. The "person of ordinary firmness" standard "is an objective inquiry which is flexible enough to accommodate the various circumstances in which retaliation claims arise and which is capable of screening the most trivial of actions." *Mitchell v. Chandler*, 2006 U.S. Dist. LEXIS 71843 (W.D. Ky. Sept. 26, 2006), citing *Thaddeus-X*, *supra*. *See also Blankenship*, *supra*; *Bennett*, *supra*; *Zelnik*, *supra*.

Many specific instances of purely verbal[12] retaliatory conduct fail to support a First Amendment retaliation claim because they are simply insufficient to deter a person of ordinary firmness from continuing to engage in

[12] Petitioner contends there is a split among the circuits as to "the proper standard for determining whether retaliatory verbal conduct toward an ordinary citizen is actionable" in First Amendment retaliation cases. To effectively evaluate whether such a split in fact exists, one must necessarily isolate First Amendment retaliation cases involving purely "verbal" retaliation. Identifying such cases is an issue unto itself which begs the question: "Verbal," as opposed to what? It is not entirely clear whether retaliation continues to be "verbal" when it extends beyond simple name-calling to, for example, an unexecuted threat, verbal release of private information about a plaintiff to a third person, an accusation, or having a conversation about the plaintiff with a third party.

protected conduct. *E.g., Naucke v. City of Park Hills*, 284 F.3d 923 (8th Cir. 2002) (harassing comments were offensive, unprofessional and inappropriate but were insufficient to deter a person of ordinary firmness from expressing political views); *McKee*, *supra* (remarks insufficient to deter person of ordinary firmness from continuing to express views about the appropriate scope of an investigation); *Dawes*, *supra* (being called a "rat" and "informant" in retaliation for filing a grievance would not deter inmate of ordinary firmness from making further grievances); *Nunez v. City of Los Angeles*, 147 F.3d 867 (9th Cir. 1998) (being "badmouthed" and threatened insufficient under the circumstances to deter person of ordinary firmness from engaging in protected conduct); *Richardson v. Sherrer*, 2007 U.S. Dist. LEXIS 4994 (D.N.J. Jan. 23, 2007) (idle threats of harassment are not actionable retaliation).

Purely "verbal" retaliation is particularly susceptible to falling short of the "person of ordinary firmness" standard because it presents a competition of First Amendment rights. Specifically, both parties to retaliation cases have rights under the First Amendment, and imposing liability for simple speech would infringe on the rights of the public official whose speech is at issue. *Suarez Corp. Ind. v. McGraw*, 202 F.3d 676 (4th Cir. 2002); *Nunez v. City of Los Angeles*, 147 F.3d 867 (9th Cir. 1998); *Chicago Reader v. Sheahan*, 141 F. Supp. 2d 1142 (N.D. Ill. 2001); *XMen Sec. Inc. v. Pataki*, 196 F.3d 56 (2nd Cir. 1999); *Mezibov*, *supra*.

However, no circuit rigidly holds that verbal retaliation is *per se* insufficient to support a First Amendment retaliation claim. Indeed, under appropriate circumstances, verbal retaliation *may* be sufficient to deter a

person of ordinary firmness from engaging in protected conduct. For example, when verbal retaliation is part of a campaign of harassment, it is generally actionable. In *Barth*, *supra*, a city employee opposed the incumbent mayor in an election. She alleged that the mayor orchestrated a campaign of petty harassments – including baseless reprimands and ridiculing her for bringing a birthday cake to the office – in retaliation for her political ambitions. The Seventh Circuit denied summary judgment to the mayor, explaining:

> . . . we cannot say as a matter of law that the exercise of First Amendment rights by public employees cannot be deterred by subjecting employees who exercise them to harassment and ridicule through selective enforcement of work rules. The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable. Yet even in the field of constitutional torts de minimis non curat lex. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise – that if the Mayor of Springfield had frowned at Miss Bart for running for public office he would be liable for damages (unprovable, of course) under section 1983. However, more is alleged here – an entire campaign of harassment which though trivial in detail may have been substantial in gross. It is a question of fact whether the campaign reached the threshold of actionability under section 1983.

Id. See also Phillips v. Bowen, 278 F.3d 103 (2d Cir. 2002); *Thomas, supra*; *McBride v. Village of Michiana*, 100 F.3d 457 (6th Cir. 1996) (pervasive verbal harassment and threats sufficient to deter First Amendment activity); *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987); *Pittman, supra*.

The authorities contained in the Petition do not support the existence of a *per se* rule in any jurisdiction. Of the authorities Petitioner cites as providing the position of the Fifth and Ninth Circuits, only two – *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999), and *Nunez, supra* – are actually First Amendment retaliation cases.[13] In *Gilbrook*, the alleged retaliation was lost job and lost pay – not merely verbal conduct. *Nunez* applies the "person of ordinary firmness" test and concludes that, *under the circumstances of that case*, the verbal conduct alleged was insufficient. Similarly, the authority Petitioner cites as the Fourth Circuit's position – *Suarez, supra* – does not represent a *per se* rule. The *Suarez* Court recognized that verbal conduct by public official could be actionable if it contained a threat, coercion, or intimidation, or if it was sufficiently embarrassing because of the disclosure of private information, or if it affects another more tangible interest. This is simply another way of saying that verbal conduct may be sufficient to deter a person of ordinary firmness, depending on the context and circumstances. Thus, *Suarez* is entirely consistent with other jurisdictions in applying the "person of ordinary firmness" standard.

---

[13] Petitioner also cites *Bender v. Brumley*, 1 F.3d 271 (5th Cir. 1993), and *Coyle v. Hughs*, 436 F. Supp. 591 (W.D. Ok. 1977). (Petition, p. 12) Neither involves the First Amendment or retaliation in any context.

There is no split among the circuits with regard to the sufficiency of verbal conduct to establish a First Amendment retaliation claim. The different results reached by the federal courts – sometimes two federal courts in the same circuit – in cases involving verbal retaliation simply reflects the fact-specific nature of the applicable standard and is proof that the standard is working as it should.

In the present case, the Sixth Circuit and the district court both clearly understood and correctly applied the "person of ordinary firmness" standard. Both reviewed the evidence extensively and concluded that a person of ordinary firmness would not have been deterred from addressing the Falmouth City Council simply because Donald England, on one occasion, called him a black bastard and threatened to engage him in a fist fight. That conclusion is appropriate inasmuch as retaliation cases are not intended to enforce a general civility code, but only to prevent conduct that would deter a person of ordinary firmness from engaging in protected conduct. *Burlington Northern*, *supra*. What Petitioner essentially seeks from this Court is a third application of the established standard – but with a different outcome. Clearly, that is not the purpose of certiorari. Supreme Ct. R. 10.

III. THE "HARASSMENT OR OTHER CONDUCT" REQUIREMENT IN EQUAL PROTECTION CASES PREMISED ON A RACIAL SLUR IS CONSISTENT WITH *ARLINGTON HEIGHTS*

To prevail on a claim under the Equal Protection Clause, a plaintiff must establish both discriminatory effect *and* discriminatory purpose. *Village of Arlington Hts. v. Met. Hous. Dev. Corp.*, 429 U.S. 252 (1977) ("Official action will not be held unconstitutional solely because

it results in a racially disproportionate impact.... A racially discriminatory intent ... must [also] be shown."); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003).

Discriminatory purpose may be established by reference to statements attributable to the person or entity accused of violating the plaintiff's rights. E.g., *Arlington Hts., supra* at 268; *Sylvia Dev. Corp. v. Calvery Corp.*, 48 F.3d 810 (4th Cir. 1995); *Elston v. Talladega Co. Bd. Of Educ.*, 997 F.2d 1394 (11th Cir. 1993); *McKee v. Rockwall*, 877 F.2d 409 (5th Cir. 1989); *Carrasca v. Pomeroy*, 313 F.3d 828 (3rd Cir. 2002). Discriminatory purpose, however, is only half of the equation in Equal Protection analysis. A plaintiff is still required to demonstrate a discriminatory effect.

For that reason, federal courts faced with the utterance of racially charged statements by public officers have refused to impose liability unless the plaintiff can show that the officer in question treated him differently in some other respect. Generally, harassment or some other conduct on the part of the officer that violates the plaintiff's rights is sufficient to establish discriminatory effect. Such was the Fifth Circuit's reasoning in *Williams v. Bramer*, 180 F.3d 699, 706 (5th Cir. 1999):

> We hold today that an officer's use of a racial epithet, without harassment or some other conduct that deprives the victim of established rights, does not amount to an equal protection violation. When leveled against a citizen by a police officer, a racial epithet, by its nature, calls attention to the citizen's racial identity. The use of an epithet is therefore strong evidence that a comment or action is racially motivated. The question in the

> equal protection context, however, is not just whether the conduct is racially motivated but also whether that action deprives a person of "equal protection of the laws." . . . Where the conduct at issue consists solely of speech, there is no equal protection violation.

See also Salley v. PA Dept. of Corr., 181 Fed. Appx. 258 (3rd Cir. 2006) (no equal protection violation, despite alleged use of slur, in the absence of evidence that plaintiff was treated differently); *Keyes v. Albany*, 594 F. Supp. 1147 (N.D.N.Y. 1984) ("An equal protection violation will be found when racial animus inspires police misconduct"); *Anderson v. Kierstead*, 2006 U.S. Dist. LEXIS (D.N.J. Feb. 6, 2006); *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 1999); *Buckley v. Gomez*, 1999 U.S. App. LEXIS 129 (9th Cir. Jan. 4, 1999).

Requiring an Equal Protection plaintiff to show harassment or some other conduct that violates his rights is not, as Petitioner claims, a "heightened evidentiary harassment threshold." Rather, that requirement simply reflects the fact that an Equal Protection claim is comprised of two elements, i.e., discriminatory purpose *and* discriminatory effect. By imploring this Court to premise Equal Protection liability on a single racially charged statement, Petitioner essentially seeks to eliminate the discriminatory effect component of such a claim. Clearly, Petitioner's position is contrary to the well-established precedent of this Court. *Arlington Hts., supra*; *Cuyahoga Falls, supra*.

Nor is there any wisdom to further defining the type of "harassment" sufficient to constitute discriminatory effect, as Petitioner suggests. (Petition, pp. 27-29) The number and variety of scenarios that could comprise

harassment are not subject to reasonable prediction and therefore cannot be easily articulated as a test. Thus, any attempt to define a set of circumstances that constitute harassment will likely exclude worthy claims. The better approach, in cases where any evidence of harassment exists, is to allow a jury to determine the issue of harassment, where any evidence of such harassment exists. Federal courts already take that approach. E.g., *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004); *Abuhouran v. Acker*, 2005 U.S. Dist. LEXIS 12864 (E.D. Pa. June 29, 2005); *Martin v. City of San Antonio*, 2006 U.S. Dist. LEXIS 54392 (W.D. Tex. July 25, 2006); *Cannon v. Burkybile*, 2000 U.S. Dist. LEXIS 14139 (N.D. Ill. Sept. 25, 2000). The present case simply was not one in which any evidence of harassment existed, no matter how many different ways Petitioner tries to manipulate the facts.

IV. PETITIONER HAS PRESENTED NO JUSTIFICATION FOR THE GRANT OF CERTIORARI AS AGAINST THE CITY OF FALMOUTH

Although Petitioner identifies the City of Falmouth in the "Parties to the Proceeding" section of the Petition, he has presented no argument that the Sixth Circuit erred in granting summary judgment to the City. As such, there is no justification for the grant of certiorari as against the City of Falmouth.

CONCLUSION

In light of the foregoing, there is no compelling reason to grant the Petition for Writ of Certiorari. The Sixth Circuit's decision in this matter does not conflict with *Burlington*

Northern, *supra*, or with any other decision of this Court, nor does the Sixth Circuit's decision conflict with any decision of any other circuit court on any important question of federal law. To the contrary, the Sixth Circuit relied on well-established principles of law and applied those principles to the facts of this case, which it construed in a light most favorable to Petitioner. Stripped of its claims of conflict among the circuits, the Petition's real contention is that the Sixth Circuit misapplied legal principles, resulting in an incorrect decision. Of course, Petitioner's assessment in this regard is wholly inaccurate. However, even if Petitioner's assessment were accurate, Supreme Court Rule 10 provides that the misapplication of established legal principles is not a compelling reason to grant a petition for writ of certiorari. Therefore, Respondents, England and the City of Falmouth respectfully request that the Court deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

MARY ANN STEWART,
Counsel of Record
JENNIFER L. LANGEN
ADAMS, STEPNER, WOLTERMANN
& DUSING, P.L.L.C.
40 West Pike Street, P.O. Box 861
Covington, KY 41012-0861
(859) 394-6200
(859) 291-7902 Fax

Attorney for Respondents,
City of Falmouth, Kentucky,
and Donald England